UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D-030
RULING ON MOTION
TO SUPPRESS STATEMENTS
OF THE ACCUSED
6 June 2008

The Defense has moved this Commission to suppress all statements of the accused made to authorities of the United States between his apprehension in November of 2001 and the time he was first advised of a right against self incrimination in January of 2004. Between those dates, the parties have identified thirty-six different statements taken from the accused without any rights warnings such as are common to American jurisprudence. Because the MCA, the UCMJ, and international law all guarantee a right against self incrimination, the Defense believes that the remedy for violation of the right must be suppression of statements taken without any such warnings. The Government argues that the accused's statutory right against self incrimination applies only to statements made during the actual trial proceedings, and that Congress has expressly denied detainees both the broader right against self incrimination under Article 31(a) and (b), and the exclusionary remedy of Article 31(d) of the UCMJ. The Commission heard oral argument from the parties on 28 and 29 April, 2008 at Guantanamo Bay, Cuba.

The Defense alleges, and the Government concedes, that there are thirty six statements at issue. The Government concedes that the accused was never warned of a right to remain silent before any of these statements were taken, but denies that any such right protects the accused. The Government argues that at least the two statements taken on the battlefield and memorialized in the "capture videos," and one statement the accused voluntarily prepared with the assistance of counsel, should not in any event by suppressed based on rights to remain silent.

THE LAW

The Uniform Code of Military Justice (UCMJ), which applies to members of the U.S. Armed forces and to prisoners of war, contains a right against self incrimination in these terms

"No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him." (Article 31(a));

"No person subject to this chapter may interrogate, or request any statement from an accused . . . without first informing him of the nature of the accusation against him and advising him that he does not have to make any statement . . ." (Article 31(b)); and

"No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." Article 31(d); 10 USC §831(a), (b), (d)

The Military Commissions Act of 2006 (MCA) provides a right against self incrimination in these terms

"No person shall be required to testify against himself at a proceeding of a military commission under this chapter." §948r(a).

Military Commissions Rule of Evidence 301(a) reiterates this provision in nearly identical language: "No person shall be required to testify against himself at a proceeding of a military commission under these rules."

The MCA also specifically addresses the applicability of the UCMJ to military commission trials in these terms:

From §948b:

(c) CONSTRUCTION OF PROVISIONS—The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice). Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided in this chapter. The judicial construction and application of that chapter are not binding on military commissions established under this chapter." MCA §948b(c), and

"(d) INAPPLICABILITY OF CERTAIN PROVISIONS—(1) The following provisions of this title shall not apply to trial by military commissions under this chapter: . . .

(B) Section 831(a)(b), and (d) (articles 31(a), (b), and (d)) of the Uniform Code of Military Justice), relating to compulsory self-incrimination."

From §949a(b)(2):

In establishing procedures and rules of evidence for military commission proceedings, the Secretary of Defense may prescribe the following provisions:

(A) Evidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person; . . .

(C) A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title."

ANALYSIS

The Defense first contends that Mr. Hamdan's statements should be suppressed because the MCA includes a right against self incrimination, and that to have any value at all, this right must be construed to apply to pretrial statements. Anticipating the Government's reply, the Defense argues that a right against self incrimination that applies only during the proceeding, but

that allows the government to freely interrogate the accused *before* the proceeding, is hardly any protection at all. The Government contends that the MCA's language is clearly limited to statements made at "a proceeding of a military commission," and that this is all the protection Congress intended to give to unlawful enemy combatants.

Notwithstanding the Defense's logic, other parts of the MCA support the Government's narrow construction of this language. First, the language Congress chose in enacting the MCA is clearly much less generous than the language of the UCMJ, and limits the protection against self incrimination to "a proceeding of a military commission under this chapter." This narrow and restrictive choice of words suggests that Congress intended a narrower right against self incrimination than it had chosen for U.S. military personnel being tried under the UCMJ. Second, Congress expressly made Article 31's protection against unwarned and coerced statements, as well as the exclusionary rule of Article 31(d), inapplicable to military commission trials, clearly indicating that Congress intended different and less favorable treatment for unlawful enemy combatants. Third, MCA §949a(b)(2) expressly declares that a statement taken from an accused shall not be excluded on the grounds of a violation of a right against self incrimination, so long as §948r has been complied with. This seems to mean that a statement shall not be excluded so long as the accused has not been forced to make it during trial proceedings held under the MCA. In light of these clear statutory commands, the Commission concludes that Congress did indeed intend that the MCA's protection against self incrimination should apply only at the proceeding itself, and that there should be no remedy of suppression for pre-trial statements taken without the rights warnings that are common in American law. While this result is at odds with the balance of American jurisprudence, it is clearly what Congress enacted.

The Defense next argues that the accused's statement should be suppressed because the UCMJ applied to Hamdan between his apprehension in 2001 and the ultimate enactment of the Military Commissions Act. Thus, he is entitled to the protections of Article 31 of the UCMJ during the interim period before Congress passed the MCA, simply because the UCMJ was the only law in place when these statements were taken. The difficulty with this position is that the UCMJ applies only to those entitled to Prisoner of War status, and the United States has consistently insisted that neither Mr. Hamdan nor any of his al-Qaeda associates or other battlefield detainees are so entitled. The Commission has determined that the accused was in fact an unlawful enemy combatant, and thus it is clear that he was never entitled to the protections of the UCMJ. Thus, while the UCMJ was in force between 2001 and 2006, it did not apply to Mr. Hamdan and he could not claim its protections.

The Defense next points to a host of international treaties for the proposition that such a right against self incrimination is one of the "judicial guarantees which are recognized as indispensable by civilized peoples" within the meaning of common Article 3 of the Geneva Conventions. The Government notes that these treaties are either non-self-executing or the United States has repeatedly refused to ratify them, and that they therefore have no binding effect. But independent of whether these treaties are applicable, Congress has addressed this contention by declaring that the system of rights it has established in the Military Commissions Act provides all of these indispensable judicial guarantees. In so doing, Congress has determined that a right against self incrimination that applies only at the proceeding itself is adequate to

respect the international standard. Thus, the Commission concludes that even if these treaties do apply to detainees before military commissions, Congress has expressly determined that the MCA satisfies them.

Finally, the Defense argues that permitting the narrower standard of the MCA (which protects only against self incrimination during the proceeding itself) to deprive the accused of protections that were in place when he was captured (i.e. the UCMJ provision that prevents coerced or unwarned statements taken before trial from being introduced at trial), violates the Constitution's Ex Post Facto prohibition by exposing him to a less generous evidentiary rule than was in effect when he made his statements. There are two answers to this contention. First, the Commission finds, under current law, that the Constitution's ex post facto provision does not protect the accused in a military commission. Even if it does, or some other ex post facto protection applies, it is not true that the accused was once entitled to a higher level of protection. The UCMJ's protections under Article 31have always been reserved for those entitled to Prisoner of War status. The United States has consistently asserted that this accused was not entitled to those protections, and adamantly refused to consider any trial that would accord to members of international terrorist organizations the protections of the Third Geneva Convention. Thus, because Hamdan was never entitled to the UCMJ's protections, he has not now been subjected to a less favorable evidentiary rule than was once in force.

CONCLUSION AND RULING

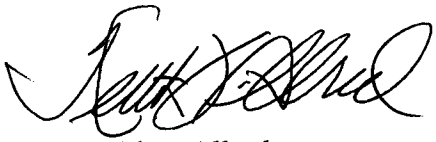
At the outset, the Commission notes that at least two of the statements made by the accused were made on the battlefield, and the Defense has not shown that these statements were taken with any law enforcement purpose in mind. The Commission is aware of a declaration of the accused, made with the consent of and in the presence of his counsel, in which he admits many of his activities prior to capture. These three statements, and perhaps others, are admissible even under the higher standard of traditional American jurisprudence. It is not clear, simply by virtue of the presence of law enforcement personnel at his interrogations, when *he* became the subject of a criminal investigation into his conduct. As Special Agent Crouch testified during the 5-6 December 2007 hearing regarding jurisdiction, criminal investigations are one of "many other things" that the FBI does (Defense motion at 10).

The result in this case is at odds with what would normally obtain under our law. It is true that in any other criminal trial held in American courts, an accused who was questioned before trial, without warning regarding his right to remain silent, could not later be prejudiced by the admission of those statements against him. Congress has expressly created military commissions that apply only to unlawful combatants, and denied to those unlawful combatants this level of protection. The Commission finds that Congress intended the right against self incrimination to apply only to statements made at trial. The accused is not and never has been entitled to the protections of the UCMJ. The International Law sources cited by the Defense, even assuming that they apply, do not entitle him to the relief he seeks for two reasons. First, the Defense has not shown that they expressly require that a right against self incrimination extend to pre-trial statements. A more limited right such as the one Congress has granted the accused may well satisfy the international standard. Second, and in any event, Congress has declared that the system of trials it established in passing the MCA satisfies its international obligations.

Finally, and apparently as an afterthought, the Defense seeks suppression of the statements on the basis that the Government has failed to identify and produce all of the investigators or interrogators who were involved in the taking of these statements. The government has asserted on numerous occasions, although not necessarily with respect to this issue, that it has fulfilled all its discovery obligations. The Commission denies this request that it suppress all statements on this basis.

The Defense Motion to Suppress the statements of the accused for failure to warn him of his rights to remain silent is DENIED.

So Ordered:



Keith J. Allred
Captain, JAGC, USN
Military Judge